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CASE NOS.: 2000-LHC-00377
2001-LHC-02951

OWCP NOS.: 06-180014
06-175304

In the Matter of

LARRY E. TURNER
Claimant

v.

DEPARTMENT OF THE ARMY
Employer

and

RSK COMPANY
Carrier

Appearances:

John M. Schwartz, Esquire
For Claimant

Donovan A. Roper, Esquire
For Employer/Carrier Servicing Agent

Before: **PAUL H. TEITLER**
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for disability compensation filed by Larry E. Turner, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act), and as extended by the Defense Base Act, 42 U.S. C. § 1651.

A formal hearing was held in Orlando, Florida on October 24, 2001, at which time all parties were afforded a full opportunity to present evidence and arguments as provided in the Acts and applicable regulations. At the hearing, Claimant's exhibits CX 01 - CX 28 were admitted into the record, as were Employer's exhibits EX 01 - EX 22. In addition the Parties submitted Pre-Trial Stipulations. All exhibits were received into evidence.[1]

The findings of fact and conclusions of law which follow are based upon my thorough analysis and review of the entire record, arguments of the parties, and applicable statutes, regulations, and case law. Each exhibit entered in evidence, although possibly not mentioned in this Decision, has been carefully reviewed and considered in light of its relevance to the resolution of a contested issue. Where evidence may appear to conflict with the conclusions in this case, the appraisal of the relative merits and evidentiary weight of all such evidence was conducted strictly in accordance with the quality standards and review procedures set forth in the Act, regulations, and applicable case law.

STIPULATIONS

At the hearing, the following stipulations were entered into the record:

1. The Act (33 U.S.C. §§901-950, as extended by the Defense Base Act, 42 U.S.C. § 1651) applies to this claim.

2. Claimant and Employer were in an employee-employer relationship at the time of the accidents/injuries.

3. The accidents/injuries arose out of, and in the scope of, employment.

4. The date of the accidents/injuries were October 22, 1997 and June 3, 1999.

5. Timely notice of injury was given Employer.

6. Medical Benefits were paid under Section 7.

ISSUES

The following issues were presented for resolution:

[1]In this decision, "CX" refers to Claimant's exhibits, "EX" refers to Employer's exhibits, and "TX" refers to the transcript of the hearing held on October 24, 2001 in Orlando, Florida or the respective deposition transcript noted in the opinion.

1. Whether Claimant sustained an aggravation or re-injury or separate injury to his right foot on July 3, 1999 and, in turn, a determination of Average Weekly Wage.

2. Entitlement to first choice of treating physician for the right foot injury and status of treatment with Dr. Mark Bornstein.

3. Nature and compensability of Claimant's left foot injuries.

4. Prior treatment with Dr. James K. Shea, M.D.

5. Entitlement to pain management due to right foot pain.

6. The nature and extent of disability/injury to Claimant, Larry E. Turner as a result of his involvement in an industrial accident on October 22, 1997.

7. Entitlement to rehabilitation and or vocational retraining benefits.

8. Penalties, interest, attorneys fees and costs.

STATEMENT OF THE CASE

Claimant, Lawrence E. Turner, was born on September 6, 1946. He was fifty-five (55) years of age and married when he testified at his hearing. In 1993, he started working for the Employer as a first line cook. On October 22, 1997, he had an accident which injured his right foot. Subsequently, Claimant alleged a second injury to the same foot on June 3, 1999 while working in Employer's kitchen.

Testimony of Larry E . Turner

Mr. Turner testified that he had been working for Employer since approximately 1993. Previously, he attended Southwestern Academy of Florida cooking school and worked as a General Manager for McDonald's Restaurants for 20 years. At the time of the hearing, he remained on Employer's payroll. Employer, Shades of Green, was a government facility, run by the Department of the Army, for military persons and some government employees while on vacation. TX 31 - 33. Claimant's job was that of first line cook or sous-chef. Soup chef duties included putting out the meals and running the buffet. TX 34 - 35. Claimant stated that he was not working now as a result of his injuries. He testified that he continued to suffer from severe pain in his foot and leg, in addition to not being able to walk well and stay on his feet for long periods of time.

Claimant described his initial injury as occurring while stacking boxes of frozen french fries in the freezer with his supervisor. A forty-one pound case slipped out of his supervisor's hands and fell on Claimant's right foot. According to his doctor, the accident caused a contusion and backup of fluids in his toe, leading to an infection. Claimant

subsequently reported the accident and went to see Dr. Kent Hoffman. TX 35,36. Dr. Hoffman prescribed an antibiotic which, Claimant stated, did not help in relieving his pain so he went to the emergency room.

At the hospital, Claimant met with Dr. Pierson; he had never seen Dr. Pierson prior to this visit. TX 37. He testified that he told Dr. Pierson that he never had any problems with his feet prior to the accident and that his medical conditions consisted only of high blood pressure and diabetes. TX 37. Dr. Pierson recommended immediate hospitalization on an emergency basis. After two days, Claimant underwent an operation on his right foot, resulting in hospitalization for two weeks. TX 38. After the hospitalization, he visited Dr. Urbach, who told him to return to work with light duty restrictions.

Upon his return to work, Claimant testified that he did not receive light duty assignments. Claimant stated that he had pain in the left foot and leg, with swelling in the right foot. Subsequently, the wound opened in the right foot, but Claimant said that he continued to work and walk very lightly. TX 37-40. At the same time, Claimant stated that he had severe pain in the right foot at the contusion area. Eventually, Claimant believes his left foot developed a problem because he was favoring his right foot. As such, a wound opened in the arch of his left foot. TX 40-42. He went to the emergency room and was seen by Dr. J. Bornstein. After being treated for the left foot wound, he stated that his right foot continued to cause him problems. TX 42-43. Claimant believes that the right foot had not healed properly since the original accident and further stated that Dr. J. Bornstein told him that Dr. Pierson had unleveled the right foot. Claimant testified to severe pain in the right foot with swelling; he said that he could not bend without pain in his back or walk straight. TX 43.

Regarding his back, Claimant testified that he had never had any problems prior to the accident. He also stated that his right foot developed severe pain, swelling, and aching all over the calf, in addition to the back pain. TX 45. The pain goes down his back to the point where he has to sit down.

Claimant denied having another accident in 1999, and stated that he did not fill out another form LS-201. He testified that he did not remember the cause of his pain being a fall off a ladder. Instead, he stated that he just told his employer that his foot was acting up again. He testified that he went to see Dr. J. Bornstein, who did not treat him for his original accident. TX 47. Dr. J. Bornstein initially had been treating Claimant's left foot, but then started treating his right foot re-injury upon Claimant's request. Dr. J. Bornstein suggested surgery on the right foot to level it. TX 48. Claimant stated that he was then started on temporary total disability benefits. He said he asked to be treated by Dr. Mark Bornstein but surgery was performed by Dr. J. Bornstein on his right foot. TX 49. After surgery, Claimant had one visit with Dr. M. Bornstein.

A couple of months after surgery, Claimant stated that he developed greater back problems, which, in his own opinion, became greater because of the unlevel walking. In light of this pain, he saw Dr. James Shea. Dr. Shea recommended a treatment plan, and

Claimant stated that he wanted to have Dr. Shea treat him. However, he also stated that he was still being treated by Dr. J. Bornstein. Therefore, he last saw Dr. Shea about two weeks prior to his hearing, when Dr. Shea provided a pain killer and increased the dosage to 900 mg every six hours. He testified that he would like Dr. Shea to treat him for pain management.

Claimant stated that his right foot hurts and throbs up his back, while his calf hurts all the way down his back through his left foot. TX 52. He continues to favor his right foot, which swells up causing him pain. He is currently taking medication to increase his circulation and to alleviate his pain. However, he stated that the pain medicine is not helping. TX 53. He has trouble sleeping and he gets up to put his foot on a pillow to try and stop the throbbing. He testified that on some days he is bedridden while on other days he can walk, shop, and cut the grass. Nevertheless, he stated that, according to Dr. J. Bornstein, he has good circulation and good pulses. TX 54.

Cross examination

Claimant testified that Dr. Pierson did not tell him on November 6, 1997 that he was suffering from an acute diabetic forefoot infection with cellulitis. He also claimed that the doctor did not tell him that he had a chronic neuropathic ulcer. He did not recall if the doctor told him that he was suffering from diabetic peripheral neuropathy.

Testimony of Dr. Mark Bornstein, M.D.

Dr. M. Bornstein was deposed on November 13, 2001. TX 3. He testified that he examined Claimant on May 26, 2000, taking a history and making a report. He found that Claimant had well-healed scars on the top of the right foot between the second and third metatarsals and the third and fourth metatarsals. TX 4. Further, he stated that Claimant suffered from a significantly atrophic plantar pad and tenderness dorsally. His diagnosis was that the patient was post metatarsal; Claimant had resections of his metatarsals one through five on his right foot. TX 4.

Assuming that Claimant came under the care of Dr. Pierson in 1997 and had surgery on his foot, Dr. M. Bornstein further testified that Dr. Pierson performed a metatarsal head resection about the second and third metatarsals of the right foot. TX 5. He stated that this surgery is standard, especially in a diabetic, because by taking out two of the metatarsal heads, you are creating a significant transfer of weight bearing pattern to the metatarsal heads one, four and five that are still left, predisposing the patient to ulcerative lesions and later problems.

The doctor was then asked to assume that Dr. Pierson did the surgery, Claimant continued to have discomfort in putting weight on the right foot, was returned to his job under light duty restrictions but was still standing often, eventually developed ulcers in the left foot and then eventually developed problems again in the right foot. TX 6. As such, Dr. M. Bornstein believes that there is a relationship between the left foot developing

ulcers and the original injury to the right foot. He believes this because when you alter the mechanics of a foot, you are going to create an altered walking pattern, not only on that foot but also the opposite extremity, which can predispose itself to developing other ulcers and problems down the road.

Dr. M. Bornstein testified that you have the initial injury on the right foot, which either directly or indirectly created a problem on the left foot and then ultimately exacerbated and re-aggravated the initial injury on the right foot. TX 6-7. However, if Claimant is placed in molded shoes and given appropriate orthodic care to off load the foot, then the likelihood would be less that the original surgery would have eventually led to the exacerbation of the right foot. He further testified that working in a kitchen and in the environment that Claimant was in, the exacerbation most likely would have developed over the course of time. Therefore, in Dr. M. Bornstein's opinion, the original right foot injury in 1997 predisposed Claimant to developing the left foot problem and, eventually, the additional right foot problem. TX 7.

Dr. M. Bornstein also reviewed the record of Dr. J. Bornstein, his brother and also a well-known podiatrist in the area. TX 8. He reviewed Dr. J. Bornstein's records and is aware of the type of medical care that Claimant has received. As a result of the injury, Dr. M. Bornstein believes that Claimant should have some environmental restrictions and not be involved in any heat or cold which could exacerbate the diabetes. He stated that Claimant should not be doing any type of cooking, lifting or carrying.

Additionally, Dr. M. Bornstein testified that Claimant complained of back problems, which, in his opinion, are a result of the right and left foot injuries creating an altered walking pattern and, ultimately, back pain.

Dr. M. Bornstein testified that he is a podiatrist, and an expert medical adviser (EMA) as recognized by the State of Florida. As such, Dr. M. Bornstein stated that he believes that there is a causal relationship between Claimant's current back problems and the difficulties he has had with his right foot. TX 9. Although Dr. M. Bornstein stated that he does not treat lower backs, he stated that he would send Claimant to see a physiatrist. TX 10. In his opinion, which he believes is in accordance with the American Medical Association guidelines, Claimant suffers from a fifteen percent (15%) permanent partial impairment.

Dr. M. Bornstein stated that Claimant may need a Tens unit in the future in order to help any pain. TX 11. Dr. M. Bornstein added that he occasionally prescribes some patients for pain management to specialized physicians who have a wide range of armamentarium to help treat chronic, unremitting pain. TX 11.

Dr. M. Bornstein also stated that he did not think that Claimant suffered from any diabatic neuropathy. TX 12. If he did suspect such a diagnosis, he would send Claimant to an endocrinologist or a neurologist/pain management specialist. TX 13. In this case, the doctor believes that if Claimant had diabetic neuropathy, with his biomechanical

problem, the two would have merged or at least intertwined. As such, Claimant would not have full sensation and would continue to walk on his foot, creating ulcerative lesions, thereafter making the diabetic neuropathy and the biomechanical problems intertwined. TX 13. He believes that there is a causal connection between the 1997 injury to the left foot and the need for Dr. J. Bornstein to do additional surgery. TX 14.

Dr. M. Bornstein testified that he practiced in Orange County for eighteen (18) years, seeing patients on a regular basis, being affiliated with South Lake and Florida Hospitals, performing surgery and being a specialist in the areas of the knee, lower leg, ankle and foot. TX 14. He stated that he previously treated diabetics with foot problems. TX 15.

Cross-Examination

Dr. M. Bornstein testified that Employer's counsel does not refer many patients to him. Regarding Claimant, Dr. M. Bornstein believes that he is permanently disabled from work as a chef or cook and should be changed to a sedentary, sit-down type position. TX 16. This belief is based on Claimant's right foot injuries.

As to Claimant's left foot problems, Dr. M. Bornstein does not believe that those injuries pre-existed Claimant's right foot injury. The injury, in his opinion, was initially to the right foot. TX 16. The right foot, either directly or indirectly, created the left foot problems and then redeveloped problems on the right. TX 16. Further, Dr. M. Bornstein stated that he is not Claimant's treating physician and that he has never referred Claimant out to a mental health counselor or physical medicine doctor.

Dr. M. Bornstein does believe that patients with peripheral neuropathy are more pre-disposed to foot ulcers than the general public, but he does not believe that Claimant had any peripheral neuropathy diagnosed. Further, he stated that there are certain types of light duty, sedentary jobs which Claimant could gainfully perform on a full-time basis. TX 17. Also, Dr. M. Bornstein believes that Claimant will likely undergo future surgeries to his right foot. TX 17. Finally, Dr. M. Bornstein stated that Claimant has a fifteen percent (15%) permanent impairment rating as the sole causal result of the right foot injury. TX 18.

Testimony of Ana Ouzts

Ms. Ouzts was deposed on October 23, 2001 in Orlando, Florida. She is employed as a claims adjuster by RSKCo., in Austin, Texas and has been employed as such for six years. TX 4. For one of those years, she worked as a medical clerk; for the remaining five years, she worked in Longshore work. TX 5. She stated that she is the adjuster in Claimant's matter, which is a nonappropriated funds case. According to her records, the case involved two accidents: the first on October 22, 1997 and the second on June 3, 1999. TX 6. She stated that during both of these accidents, she understands Claimant to be an employee of Employer and that both of these accidents are compensable. She testified that she is the second adjuster on this claim; during the first accident in 1997, the

original adjuster was Lee Janicek. TX 8. She stated that in 1999, she became the adjuster on the 1997 claim as well as the 1999 claim. TX 8-9.

She stated that the french fries were dropped on Claimant's right foot and that subsequently, Claimant had an aggravation to the right foot. TX 9. According to her records for the 1997 accident, Claimant's average weekly wage was $386/compensation rate was $257.46. TX 10. This is based on payroll records indicating an annual wage of $20,810.65 for the period from 10/24/96 - 10/22/97, or 52 weeks. TX 15. These figures did not include concurrent earnings. TX 16. After receiving information on Claimant's second job, she stated that for the 1997 accident, Claimant's average weekly wage was adjusted to $579/compensation rate of $386.77. TX 17. She said that Claimant was back paid for this adjustment and that he continued to be paid until June 11, 1998.[2] TX 17.

Ms. Ouzts stated that Claimant reached Maximum Medical Improvement (MMI) on the first accident on May 21, 1998, based on a report by Dr. Urbach. TX 18. Claimant saw Dr. Urbach for an independent medical exam selected by the Carrier. TX 19. Regarding other treating physicians for the 1997 accident, she stated that Claimant was also seen by Dr. Hoffman and Dr. Pierson, his authorized treating physician. TX 20. According to the file, Ms. Ouzts believes that Claimant was never given a choice as to physicians, in that the file does not indicate that Claimant actually chose Dr. Pierson as his first choice treating physician. TX 21. Dr. Pierson never gave a date of MMI or an impairment rating. TX 22. The only date of MMI and impairment rating, as indicated by the file, was given by Dr. Urbach. TX 22. Dr. Urbach indicated an impairment rating of thirteen percent (13%), and Carrier paid the corresponding sum bi-weekly. TX 24.

Regarding the second accident (June, 1999), Ms. Ouzts stated that Claimant saw Dr. J. Bornstein for the injuries relating to this accident. TX 25. She said that the Carrier sent Claimant to Dr. Christopher Mason for an independent medical examination; Claimant also saw Dr. Mark Bornstein. Also, she stated that Claimant was seen by an unauthorized physician, Dr. Shea. She believes that Claimant selected Dr. J. Bornstein because he was already treating the other foot for a non-work related condition. However, she does not have any paperwork indicating a choice of physician. TX 26-28. Upon request for authorization to see Dr. M. Bornstein, the request was denied because Claimant was getting proper care from his treating physician, Dr. J. Bornstein. She said that she never received any indication that he wanted to change doctors. TX 29.

According to Ms. Ouzts, Dr. J. Bornstein provided conservative treatment, performing surgery on Claimant's foot and recommending stockings and foot inserts. TX

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[2]She also stated that from 10/30/97 through 1/22/98, Claimant was paid for both jobs at the aforementioned rate. In January, 1998, Claimant's treating physician released him to limited duty, working only one job with Employer. As such, from January 23, 1998 through June 11, 1998, Claimant was paid at the compensation rate of $119.79 for loss of the second job.

30. Dr. Pierson, in the first claim, also provided conservative treatment, performing surgery as well. Claimant last saw Dr. J. Bornstein on March 1, 2001, where the doctor stated that the implants had been helping. TX 31. According to Dr. J. Bornstein, Claimant had reached MMI on July 17, 2000. TX 31. Dr. M. Bornstein sent in an impairment rating, but Dr. J. Bornstein did not. However, she stated that the Carrier did not accept this impairment rating; as such, an impairment rating has not been given to the second case. TX 32. Dr. J. Bornstein filled out an OWCP-5 restriction evaluation stating that Claimant can operate a car or truck, but cannot do repetitive movements with his foot. Therefore, she classified Claimant as sedentary. TX 33.

She stated that Claimant has not returned to his job with Employer. TX 33. She said that they have asked Employer to see if they have anything that would fit within Claimant's medical restrictions, but they are still looking into whether they have any such positions. TX 33-34. She said that she is not aware of any requests for Claimant to see Drs. Newberry, Padnos or Suarez. Nor is she aware of a letter requesting a change in first choice physician to Dr. Mark Bornstein. However, she claims that she received the letter of December 10, 1999 requesting one of three physicians and nursing assistance. TX 35. She further stated that there was no medical request from Claimant's doctor for a psychiatrist, nor did his file suggest that one was needed. TX 36. She said that she never responded to the request for a psychiatrist by writing to Claimant's counsel or his doctors or sending Claimant for a psychiatric independent medical examination. TX 36-37. She said that she did not indicate to Claimant, his counsel or his treating physician that if he did not continue with recommended surgery that he would be cut off from benefits. TX 39.

She said that she was aware of a request for Dr. Shea. TX 39. However, this request was denied based on the lack of any necessity expressed from Claimant's treating physician. She said that she was not aware of any information stating that Claimant suffered from lower back pain. TX 40. As such, no authorization was granted for Dr. Shea to treat Claimant for lower back pain. TX 42, 48.

Ms. Ouzts stated that the average weekly wage and compensation rates for the 1999 accident were $341.09 and $227.40, respectively. TX 43. She believes that the injury suffered as a result of the 1999 accident showed some ulcers in his right foot with pain. TX 44. She did not recognize any depression or back problems. Further, she stated that Dr. J. Bornstein did not indicate that Claimant needed lower back treatment. TX 44. However, he has not made a statement as to such in the records. TX 45. The same situation occurs with psychiatric treatment recommendations; no records exist as to Dr. J. Bornstein's recommendation for or against such treatment. TX 45. Also, she said that she is not aware of any letter from Dr. J. Bornstein stating that Claimant can only perform sedentary work. TX 47. Finally, she said she never spoke with Dr. J. Bornstein and only requested medical records from his office receptionist. TX 47-50.

Cross-Examination

Ms. Ouzts testified that Claimant has never refused treatment from Dr. J. Bornstein, nor has there ever been a compelling need for a change of treating physicians from Dr. J. Bornstein to Dr. M. Bornstein. TX 50-51. She also stated that the credentials of the two Bornstein doctors were the same. After reading the deposition of Dr. J. Bornstein in this matter, she claimed that she did not feel that a psychiatric evaluation was necessary for Claimant.

She stated that the file indicated that an additional two percent (2%) scheduled injury to the right foot was paid out subsequent to the thirteen percent (13%) being paid out. TX 53. This began on 9/19/00 and an LS208 was filed on the same date. TX 53-54.

Re-Direct Examination

She stated that Claimant agreed to be examined by Dr. J. Bornstein. TX 56. Further, the credentials of both doctors Bornstein are similar. TX 57. She said she knows nothing further about their credentials. TX 57. The additional two percent (2%) was allowed by another adjuster who handled this file while Ms. Ouzts was on maternity leave. TX 59. There has never been anything paid to Claimant based on an impairment rating for the 1999 accident. Finally, she stated that psychiatric referrals, as well as back pain referrals, will be covered by the Carrier based on an evaluation of the treating physician's recommendation, Claimant's preference and the Carrier's determinations. TX 59-61.

Testimony of Dr. James K. Shea, M.D.

Dr. Shea stated that he specializes in physical medicine and rehabilitation. He is board-certified in this field and has taken the required courses to see worker's compensation patients in Florida. He is licensed in both Florida and Texas. TX 3. He attended medical school at the University of South Florida in Tampa and had his residency at Baylor in Houston, Texas. TX 3.

He explained that physical medicine and rehabilitation are the two aspects of his field. TX 4. He said that his field developed to manage the overall care of patients from head injury, spinal cord injury, amputations and the like. TX 4. Since most of these patients had chronic pain, the field evolved into chronic pain management and therapy. TX 4. His title is physiatrist. TX 4. He stated that he sees patients on a regular basis and often uses physical therapists, massage therapists and even chiropractors to assist in the overall management of the patient's needs. He also agreed that each patient's course of treatment is individualized. TX 5.

Dr. Shea stated that he saw Claimant once and conducted an EMG and neurological evaluation. TX 6. Dr. Shea believes with a reasonable degree of medical certainty, that Claimant does not suffer from diabetic neuropathy. TX 8. He understands that Claimant suffered an injury in 1997 when a box of frozen french fries fell on his foot.

TX 8. He also understands that Claimant reached a degree of Maximum Medical Improvement (MMI) post-surgery and he eventually returned to work. TX 9. He understands that Claimant underwent extensive treatment with Dr. J. Bornstein, including his operating on Claimant's metatarsal heads. Dr. Shea's diagnosis was that Claimant had back problems relating to improper body mechanics during walking, which lead to some degeneration of his lower back and resulting in chronic lower back pain. TX 10-11. Dr. Shea believes that treatment for this diagnosis is with physical therapy and exercise over the course of three to four months. TX 11-12. Dr. Shea admits that this therapy will probably not cure Claimant from his back pain and discomfort, but will instead make him as comfortable as possible. TX 12. He does not think that Claimant has reached MMI for his back pain. TX 12.

Dr. Shea agrees that Claimant is no longer able to perform the kind of work he was previously doing. TX 12. He also admits that it would be challenging to find an employer to hire him with his two bad feet and bad back. TX 13. As such, Dr. Shea concluded that, within a reasonable degree of medical certainty, the right foot medical problem would have contributed to the back problem. Within the same degree of certainty, Dr. Shea proffered that there is a causal relationship between the back problem and the injury which took place to his foot in 1997. TX 13-14. However, he went on to state that he would not go so far as to state that the only reason Claimant injured his left foot was because of the initial injury to his right foot. But he agrees that Claimant's right foot very likely contributed to the injury on the left side. TX 14-15. Essentially, Dr. Shea stated that the injury to the right foot put Claimant at a much higher risk to develop the left foot problem. TX 16. In his opinion, the right foot injury contributed to the left foot's eventual ulcer and treatment by Dr. J. Bornstein. TX 16.

Assuming that Claimant was treated by Dr. Pierson, had a resection of the second and third metatarsal, reached MMI but was not free from pain, could walk without putting too much pressure on the right foot, developed an ulcer on the left foot, and treated with Dr. J. Bornstein over the course of nineteen (19) visits concluding with surgery, Dr. Shea believes that there exists a causal relationship between the low back pain and the original injury to the right foot in 1997. TX 18. He bases this result on Claimant's altered gait caused by the removal of his metatarsal tips. TX 18-19.

Cross-Examination

In his August 28, 2001 deposition, Dr. Shea stated that he deferred to Claimant's other treating physicians on causal relativity issues regarding the right foot condition. TX 21-22. As to his current opinion, he stated that he would defer to Claimant's other treating physicians in discussing non-biomechanical issues of gait relating to what was the diabetic condition of Claimant's foot. TX 22-23. However, Dr. Shea believes that his analysis of how Claimant's gait impacts his feet is well-thought out and continues to have value. TX 23.

Dr. Shea is comfortable with saying that the right foot contributed to the left foot problems but he is not prepared to say that the right foot issues were the only contributing causes of the left foot problems. He stated that there are other medical issues related to his left foot problems that Dr. J. Bornstein might be in a better position to address. TX 23. He would defer to Dr. J. Bornstein on other potential contributing causes, but Dr. Shea feels that the right foot problems contributed to the left foot problem. TX 25.

Dr. Shea stated that he is not a vocational rehabilitation counselor nor has he been trained in that field. TX 25. He testified that Claimant is not completely disabled from all types of employment at this point in time, and that he cannot work as a full-time cook. TX 26. Further, Dr. Shea stated that Claimant is temporarily disabled from most types of employment. That is, Claimant should have handicap parking (which he already has) so that he does not walk any significant distances. Dr. Shea also stated that the majority of Claimant's future job should be in the seated position without any extensive walking. TX 26. Further, Claimant should be able to get up frequently, avoid the cold and damp environment, have a secure walking surface, not climb, and avoid any stooping or lifting from below the waist in order to reduce stress on his back. TX 26-27. Dr. Shea also believes that Claimant should not be using his feet for the pushing of levers and so forth. TX 27. Should there be a position within a twenty-five (25) mile radius of Claimant's home which fits this description, Dr. Shea believes that Claimant would not be precluded from such employment. TX 27. However, he added that Claimant should first complete a rehabilitation program for his back. Dr. Shea believes that after treatment, Claimant should reach MMI on his low back within three to four months. TX 28.

Dr. Shea met with Claimant once, and has not seen him again. TX 28. During that meeting, he knew that Claimant was on Neurotin, a medication for diabetic neuropathy that can control nerve based pain. Dr. Shea believes that Claimant may have some type of nerve based pain which may be diabetes related. He is unsure as to whether, within a reasonable degree of medical certainty, Claimant has diabetic peripheral neuropathy. He would defer that question to the doctor or doctors that prescribed the Neurotin. However, he does not feel that Claimant has any sensory abnormalities.

Dr. Shea stated that he believes that Claimant has not reached MMI on the low back but after a three to four month period, should have reached that point. He further agreed that Claimant had been prescribed Neurontin, an anti-seizure medication, also used for neuropathic type pain. TX 29. Upon clinical exam, Dr. Shea stated that Claimant did not have any loss of sensation in his feet which would lead to diabetic foot problems. But he also stated that he may have some nerve based pain which may be diabetes related. TX 31. He admitted that he knew that Claimant had been diagnosed with diabetes for a long time. TX 31.

However, Dr. Shea cannot testify to a reasonable degree of medical certainty, that Claimant has a diabetic peripheral neuropathy of any variety or form. He said that he can only testify that being on the Neurontin suggests that he may have been believed to have a pain-related condition. TX 31. He stated that he would defer the issue of whether or not

Claimant has a dysesthetic pain condition but would not defer whether Claimant has a sensory abnormality in his feet. This is because he examined Claimant and did not find such abnormality. TX 31.

Deposition Testimony of Dr. Jay Bornstein

Dr. J. Bornstein first testified by deposition on August 16, 2000. He stated that he graduated from the Ohio College of Podiatric Medicine in 1984, and had his residency at the Florida Hospital East, Orlando, Florida in 1986. TX 4. He also stated that he is board-certified by the American Board of Podiatric Medicine. TX 4. He stated that he conducted surgery on the Claimant on January 13, 2000 and that surgery is a regular part of his practice. TX 5. He first treated Claimant on August 20, 1998 in the Emergency Room for a different issue (ulcer on his left foot; approximately 19 office visits between August and December, 1998. TX 9-10). He further stated that he treated Claimant for his left foot prior to August, 1998. TX 8.

However, on June 3, 1999, Dr. J. Bornstein first began treating Claimant for his right foot injuries. TX 9. Prior to that date, Dr. J. Bornstein did not treat Claimant's right foot. TX 9. He also stated that he does not have any references by Claimant in his office notes from August 20, 1998 through May 19, 1999 to any type of accident or injury to the right foot. TX 11.

He stated that Claimant came in to see him on June 7, 1999 because of an ulcer underneath his fifth metatarsal and underneath the right big toe. TX 13. His findings, upon examination, noted no drainage of either lesion and evidence of partial second and third metatarsal resections with phalangeal bases. This represents a biomechanical issue, which is predisposing the patient to these lesions. TX 13. Dr. J. Bornstein stated that he did not know the original cause of these injuries other than it may have been caused by something at work. TX 14. He stated that he thinks the cause of the right foot ulcer was a biomechanical issue. TX 14. As a result of the resection done by Dr. Pierson involving the second and third metatarsals, he believes that there were biomechanical issues which caused Clamant to have an altered gait. TX 15. He does not recall any complaints of Claimant's back pain at this visit, while it is his usual office procedure to note patient complaints when they come to see him. TX 16.

Dr. J. Bornstein recalls restricting Claimant's work from June 3-28, 1999 and September 8-20, 1999. TX 17-18. He stated that Claimant still has neuropathic pain in his feet which is going to make it difficult for him to do any prolonged standing. TX 18-19. He would rule out the return to work as a cook unless it was in a desk job capacity. TX 19. He also stated that he does not know the cause of diabetic neuropathy but can break it down to two scenarios. The first is that the nerves become starved for blood supply and, as a secondary sequela of the diabetes, vessels are not able to pass nutrients through to the small vessels that supply the nerves. TX 20. The second is a metabolic build-up resulting in malfunctioning peripheral nerves. TX 20. The symmetry of what is happening

is what would lead him to believe that the condition is actually caused by diabetes as opposed to a traumatic event. TX 20.

In his opinion, he has no ability to know what, if any, degree of neuropathy was present prior to the October 22, 1997 accident. TX 21. He stated that neuropathy in a diabetic is variable. Although, he can state that if the result of that injury was a surgery that ultimately resulted in two metatarsals and the bases of the phalanges being partially removed, then Claimant now possesses a foot at greater risk of injury. TX 21-22. Just due to the biomechanical imbalance, Claimant is at greater risk for tissue breakdown. TX 22.

When asked to assume that the Florida Hospital East records from October-November 1997 are absent of references to left lower extremity problems or pain complaints, Dr. J. Bornstein stated that causative factors, such as a box of frozen french fries falling on the right lower extremity, go only to a treatment plan. TX 26-27. He also stated that Claimant has permanent impairment to his right foot. TX 27.

Dr. J. Bornstein stated that Dr. Urbach performed an IME on Claimant on May 21, 1998 and thereafter issued a report and also issued an OWCP-5 work restriction evaluation. He agrees with those restrictions and adds that Claimant should be wearing molded shoes. TX 31. He also stated that with regards to the right foot, twenty one percent (21%) of the foot and fifteen percent (15%) of the lower extremity correlate to a six percent (6%) total body impairment rating resulting from the loss of function of all five metatarsal joints from the resecting surgical procedure. TX 31. As to the loss of plantar sensation in the forefoot and big toe, Dr. J. Bornstein stated that they are a result of diabetic neuropathy. TX 33.

Further, Dr. J. Bornstein stated that Claimant never complained of depression. As such, he never made a psychiatric referral. TX 34. He stated that he did refer Claimant to a podiatrist, Dr. M. Bornstein. TX 35. He stated that Dr. M. Bornstein has no more of a specialty in treating patients with diabetic neuropathy than Dr. J. Bornstein. TX 35. He is never opposed to patients getting second opinions from anyone and often times encourages it. TX 36.

With regards to Claimant's left foot, he believes that the impairment is not going to go away. TX 39. Any treatment he is giving is not making much headway. TX 39. He believes that the impairment in Claimant's left foot is due to his neuropathy. TX 39. However, he cannot give an opinion as to whether or not Claimant's left foot diabetic neuropathy was aggravated or not by the October 1997 Worker's Comp incident. TX 39-40. Assuming that Claimant had peripheral diabetic neuropathy prior to October 22, 1997, Claimant's foot would be more prone to exacerbation of the injury. TX 40. He went on to state that it is not medically possible to state whether or not Claimant had a pre-existing permanent impairment due to his neuropathy. TX 41.

Cross-Examination

Dr. J. Bornstein was again deposed on January 24, 2002. On that date, he testified that he first met with Claimant regarding a foot injury on August 20, 1998 at the emergency room at Florida Hospital in East Orlando while he was on call. TX 5, 6. He stated that he treated Claimant more than five times since then and was aware of the fact that prior to the time of treatment to the left foot, Claimant had a right foot problem. TX 6. Further, he stated that Claimant had an infected process on the right foot that resulted in a resection of two metatarsal bones, as well as the base of the second and third toes. TX 8. This resulted in Claimant's inability to properly distribute weight across that foot, forcing it to be more weight bearing and setting it up for tissue breakdown. He stated that molded shoes could help Claimant in redistributing his weight.

Dr. J. Bornstein did not recall diagnosing Claimant with any back problems, however he did state that he has seen persons with altered gait develop back problems in the past. TX 11. In those cases, he would treat them in conjunction with a back specialist. TX 11. As of now, Dr. J. Bornstein recommends any position where Claimant is going to lessen the load on his feet. TX 13. He stated that he prescribed pain management for Claimant from a biomechanical standpoint and for neuropathy too. TX 14-15. Beyond that, he stated that he is not a big proponent of narcotic medication for long term pain. TX 15.

With diabetic neuropathy, it is usually diagnosed via an EMG and treated by a endocrinologist or a neurologist. TX 16. Diabetic neuropathy is divided into two types, mononeuropathy and polyneuropathy, both determined by an EMG. In his opinion, diabetic neuropathy intertwines itself with the biomechanical imbalance, such that one effects the other. TX 17. In determining the lack of or non lack of sensation, the initial screening on Claimant revealed that he has many of the same issues that a normal diabetic would have, except his are exacerbated by surgery. TX 19-20. He has prescribed Claimant molded shoes, so as to dissipate weight across a broader area and decrease the overall pressure on a certain area. TX 20.

Re-Direct Examination

Dr. J. Bornstein stated that he did not know if the molded shoes provided to Claimant were covered under worker's compensation. Also, he stated that Claimant suffers from neuropathic pain in his foot. TX 22. The pain specialist he prescribed was to handle the pain in his foot. He was not aware of any other pains; he believes that Claimant would have complained of other pains to him during treatment. TX 23. Dr. J. Bornstein referred Claimant to pain management at the Florida Hospital Group; he does not remember ever referring his patients to a Dr. James K. Shea. TX 24. Instead, he stated that he uses Dr. Imfeld. TX 24. He did not recall whether Claimant complained of low back pain which is indicative of a need for chronic pain management care for the low back, as opposed to the neuropathy problems and the neuropathy pain he has in his feet. TX 25. Dr. J. Bornstein stated that in Claimant's case, if he felt like a referral was needed

to a pain management doctor, would he send Claimant to the anesthesiology department at Florida Hospital. TX 27.

Dr. J. Bornstein stated that he approved and disapproved certain jobs for Claimant with John Kolbeski, Labor Market Surveyor. TX 28. Regarding the office visits between August 20, 1998 and June 17, 1999, he stated that he did not remember whether the left foot treatment was ever reported to any worker's compensation carrier as being employment-related. TX 29. He further stated that he still believes that Claimant can be diagnosed with diabetic peripheral neuropathy in both feet. TX 30. He also believes that there are certain jobs that Claimant can still perform in light of this diagnosis. TX 31.

Re-Cross Examination

Dr. J. Bornstein stated that he does not know whether pain management is going to do much for Claimant's biomechanical imbalance; instead he would be looking for pain management physicians to deal primarily with neuropathic pain. Dr. J. Bornstein stated that he knows that Claimant is on Diabeta for his diabetes treatment, but is unaware of other parts of his body that have been affected by the diabetes. TX 35.

Of the jobs that have been approved for Claimant, there is a level of trial and error before Dr. J. Bornstein can say that the specific job will not be appropriate. TX 37. For example, a job where Claimant would stand for eight hours a day would certainly not be appropriate. TX 37. As such, Dr. J. Bornstein would have to know more information about the job before recommending it. TX 37.

After reading his notes from October 17, 2001, Dr. J. Bornstein stated that Claimant did complain of low back pain. In light of this, he would refer Claimant to a specialist to check out the back problem. TX 41. He did not do any type of objective medical testing on Claimant's low back. TX 43. With the exception of the October 17, 2001 note, Dr. J. Bornstein does not have any other recollection of Claimant's complaints of low back pain. TX 44. As such, he further stated that his referral for pain management would be primarily for his foot. TX 44-45. Assuming that the prescription for pain management written by Dr. J. Bornstein or his partner was in September, 2001, such prescription was on the basis of neuropathic pain in Claimant's foot. TX 45. Finally, Dr. J. Bornstein stated that he cannot give any additional physical restrictions or a different impairment rating over and above the previously stated 15% in light of not seeing Claimant for another evaluation. TX 46.

Re-Direct Examination

Dr. J. Bornstein stated that an uneven gait or a biomechanical imbalance can cause a back problem. Whomever Claimant is referred to, Dr. J. Bornstein would expect him/her to determine the cause of the pain. TX 47. Any imbalance in the biomechanical part can aggravate Claimant's pain. TX 48. As such, the soles of Claimant's molded shoes will have to be re-casted from time to time. TX 48.

Re-Cross Examination

Dr. J. Bornstein stated that he would still refer Claimant to the anesthesiologist and pain management center at Florida Hospital. He also stated that he received a letter from RSKCo adjuster Anna Ouzts inquiring into the pain management issue and asking him to clarify the exact extent of the prior pain management request made in September 2001. TX 52. Prior to September 17, 2001, he stated that Claimant never complained to him of low back pain. TX 52. After September 17, 2001, the reason for the referral for neuropathic pain management would have been for the foot pain. TX 52. Finally, Dr. J. Bornstein stated that the October 16, 2001 letter asks for an objective medical report to support the pain management referral, as it relates to Claimant's work-related right foot injury. TX 52.

Deposition Testimony of Dr. Kent Hoffman, D.O.

Dr. Hoffman, an osteopath, was deposed on February 7, 2002. He has been board certified in family medicine for eleven years (TX 4) and a family practitioner for ten years (TX 29). He stated that he attended the Chicago College of Osteopathic Medicine and did his residency at Florida East Hospital. He also stated that he sees patients on a regular basis. TX 29.

He first met with Claimant on May 5, 1995. TX 5. He was aware of Claimant's diagnosis of diabetes and had prescribed treatment through Diabeta. TX 6. He did not have a record of any other diabetes medication but had known of prescriptions for hypertension and high blood pressure. He stated that he treated Claimant for these conditions. TX 7. For Claimant's diabetes, Dr. Hoffman prescribed Diabeta and Glucophage. TX 7.

On October 29, 1997, Claimant came to see Dr. Hoffman for a worker's compensation injury as a result of a case of french fries having fallen on Claimant's right second toe on October 22, 1997. TX 9. Dr. Hoffman told Claimant that he should stay off his feet for between five and seven days. He has no recollection of whether or not Claimant actually took off from work and stayed off his feet since that time. TX 10. Assuming that the medical records indicated that Claimant, subsequent to October 29, 1997, returned to two full time jobs working eight hours a day until he had an operation in November of 1997, Dr. Hoffman stated that such conditions would not have helped eradicate Claimant's infection. TX 11.

Dr. Hoffman continued to treat Claimant with Diabeta and Glucophage through October 10, 2000. TX 13. He also prescribed Norvasc, Catapres-TTS and Zestril, all of which are anti-hypertensions. TX 13. The Zestril is also used to control kidney function in diabetics. TX 13-14. As of August, 2001, Claimant's blood sugars were very bad, according to Dr. Hoffman. As such, he referred him to an endocrinologist because Claimant was maxed out on oral medications and could possibly need insulin prescriptions. In Dr. Hoffman's opinion, Claimant's diabetic condition has been poorly

maintained. TX 15. A better course of treatment would be insulin, proper diet and exercise. TX 16. As to Claimant's blood pressure, Dr. Hoffman believes that it has been fair to poorly maintained. TX 16. He has never suspected that Claimant may have or that he actually does have diabetic neuropathy in his lower extremities. TX 18. Assuming that Dr. J. Bornstein has been treating Claimant since October, 1997, Dr. Hoffman would defer his medical opinions to Dr. Bornstein as to whether Claimant does or does not have diabetic peripheral neuropathy. TX 18.

Cross-Examination

Dr. Hoffman stated that diabetic neuropathy is a clinical diagnosis, not typically diagnosed by an EMG. As far as insulin, there is short duration and long duration insulin. TX 22. He believes that insulin is usually a pretty good and effective treatment for diabetes. TX 22. He also stated that other recognized treatments for blood sugar include diet and exercise. TX 23.

In diagnosing diabetic neuropathy, Dr. Hoffman stated that he would look for an altered sensation in the lower limbs, feet and hands. TX 24. He also stated that he saw Claimant in January, 1998 for a post-hospital visit. TX 24. He stated that Claimant was very depressed and emotional during the initial interview and exam. TX 25. However, Claimant stated that he was not suicidal. TX 25. Dr. Hoffman diagnosed depression and prescribed Desyrel. TX 26.

Dr. Hoffman stated that eating excessive sugars causes blood sugar to go up. TX 27. He also stated that emotional stress, physical stress, and injury to the foot with eventual surgery can also cause blood sugar to go up. TX 27. On the date which Dr. Hoffman first saw Claimant for purposes of his foot injuries, Dr. Hoffman said that he billed "workmen's comp." TX 27.

Redirect Examination

On the August 30, 2001 visit, Dr. Hoffman stated that Claimant had no complaints and just wanted a checkup. TX 29. Dr. Hoffman diagnosed Claimant with ADDS (Adult Onset Diabetes Mellitus). He stated that he has been diagnosing Claimant with this since May 5, 1995. TX 29-30. He stated that this disease can cause or contribute to the cellulitis that he also diagnosed. TX 30.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

The person seeking benefits under the Longshore Act has the burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 312 U.S. 267 (1994). Such burden of persuasion obliges the person claiming benefits to persuade the trier of fact of the truth of a proposition. This burden is not met where the person claiming benefits simply comes forward with evidence to support a claim. With this in mind, I will address each of the issues presented in this matter.

Issue 1: Whether Claimant Sustained an Aggravation, Re-injury or Separate Injury to his Right Foot on June 3, 1999.

A key distinction in this matter rests on deciding whether Claimant aggravated a previously compensable injury or instead suffered a new and/or separate injury altogether. Claimant argues that the 1997 injury was simply aggravated by the 1999 injury. As such, where an employment-related injury combines with, or contributes to, a pre-existing impairment or underlying condition, the entire resulting disability is compensable. *Johnson v. Ingalls Shipbuilding, Inc.*, 22 BRBS 160, 162 (1989). Any current disability is related to the first injury and benefits are paid on the bases of the average weekly wage (AWW) as of the time of the first injury. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Such a finding will result in any compensation rate being determined as of the date of Claimant's first injury, October 27, 1997.

On the other hand, Employer argues that the 1999 injury should be classified as a completely separate injury. As such, Claimant's compensation rate should be determined using Claimant's 1999 AWW. Following the October 22, 1997 industrial accident, Employer paid Claimant at an Average Weekly Wage (AWW) of $579.87 (Compensation Rate of $386.77).[3] This amount included concurrent earnings from a second job as a cook that Claimant held at the time with the Orlando Ale House. EX 20. However, on January 22, 1998, Claimant returned to full-time work, with restrictions. EX 2. Further, on May 21, 1998, an independent medical examination revealed that Claimant reached maximum medical improvement from his 1997 injury. Subsequently, he returned to full-time

[3]In calculating Claimant's AWW in accordance with 33 U.S.C. §910(a), I am within my discretion to estimate Claimant's AWW solely by considering his earnings on the year prior to his injury, even if the employee only worked during 27 weeks prior to a scheduled injury under the Act. In this matter, there is no evidence that Claimant's most recent year of employment prior to each accident does not accurately reflect his earning capacity. In any situation wherein Claimant works at his regular employment for substantially the whole of the year prior to the date of injury, or alternatively returns to work form a prior injury and then works at his regular employment for substantially the whole of the year prior to re-injury such that 33 USC §910(a) is applicable, an ALJ under these circumstances has little discretion but to apply the Section 910(a) formula calling for AWW calculations based upon the 52 weeks immediately prior to the injury, or alternatively the most recent injury. *See Director, OWCP, v. General Dynamics, Corp.*, 769 F.2d 66 (2nd Cir. 1985).

employment with Employer. EX 20. Claimant worked full-time for Employer for substantially the whole of the year prior to his June 3, 1999 accident and injury, yet did not hold any other concurrent employment during that year. EX 19. Claimant's AWW following the 1999 injury was calculated by Employer at $341.09 (Compensation rate of $227.40) pursuant to Section 10(a) of the Act. EX 19, 20.

The major distinction here is that Claimant's AWW for the June 3, 1999 injury did not include earnings from the Orlando Ale House because he resigned from that position on November 2, 1997. Nor did this rate include any other concurrent earnings, as Claimant did not hold a second job at the time of his second injury. Therefore, Claimant was paid at a higher compensation rate in 1997 because of the fact that he was working a second job resulting in concurrent earnings at that time. Employer argues that the 1999 accident should be considered a new accident and that Claimant should be issued payment in accordance with his 1999 AWW as opposed to his higher 1997 AWW.

After an extensive review of the evidence on this matter, I hold that Claimant's June 3, 1999 accident/injury should, in fact, be classified as a new injury. Therefore, any compensation rate should be determined using Claimant's Average Weekly Wage (AWW) at that time. I base this conclusion on the notion that Claimant's latest injury is not simply a natural and unavoidable progression of his initial 1997 injury but is instead a new injury altogether.

The Section 20(a) presumption of the Act provides Claimant with a presumption that the disabling condition is causally related to employment, if it is shown that Claimant suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated or accelerated the condition. *See, eg., Gencarelle v. General Dynamics Corporation*, 22 BRBS 170 (1989). Once Claimant has invoked the presumption, the burden shifts to Employer to rebut the presumption with specific and comprehensive medical evidence severing the connection between such harm and Claimant's employment. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the presumption is rebutted, then the evidence must be weighed and a decision rendered that is supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280 (1935). When a claimant sustains a second work related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. *See generally Independent Stevedore v. O'Leary*, 357 F2d 812 (9th Cir. 1966). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. *Wheatly v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). If, however, the second injury aggravates a claimant's prior injury, thus further disabling the claimant, the second injury is the compensable injury, and liability therefore must be assumed by the employer or carrier for whom the claimant was working when re-injured. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g 15 BRBS 386 (1983).

In this matter, it cannot be said that Claimant's second injury (1999) was the natural progression of his initial injury involving a dropped box of frozen french fries (in 1997). In

order to do so, one would have to conclude that the consequences of that injury, i.e. the injury to and subsequent removal of his second and third metatarsals, naturally lead to the 1999 injury to Claimant's fifth metatarsal and big toe. This rationale is not supported by the treating physician' testimony, as explained *infra*, in conjunction with Claimant's testimony regarding the amount of time between alleged accidents. Therefore, I cannot follow the precedent established in *Wheatly*, *supra*, as the facts in this case do not present an exacerbation and/or aggravation of Claimant's initial traumatic injury.

Instead, I conclude that the *Strachan* decision is more appropriately applied here.[4] Claimant's initial injury occurred in October, 1997. Dr. J Bornstein stated that Claimant first requested his subsequent treatment on June 3, 1999. J. Bornstein TX 9. Between these dates, Claimant reached maximum medical improvement (MMI) on the initial injury and returned to work. On June 7, 1999, Dr. J. Bornstein treated Claimant for an ulcer underneath his fifth metatarsal and underneath his right big toe. J. Bornstein TX 13. While this visit may not have resulted from a tangible second accident, I have no doubt that Claimant's return to work following his initial injury has caused a second injury. As stated in *Strachan*, if the second injury aggravates a claimant's prior injury, thus further disabling the claimant, the second injury is the compensable injury, and liability therefore must be assumed by the employer or carrier for whom the claimant was working when re-injured. *See supra*. I find that this is the situation which this case presents, allowing for my similar holding.

Also relevant here is that there has been testimony stating that Claimant continued to work his second job immediately after the injury on a close to full-time basis. On January 22, 1998, Claimant was cleared by Dr. Pierson to return to full-time work with restrictions. EX 2. Further, Ms. Ouzts stated that on May 21, 1998, Claimant had reached MMI, according to Dr. Urbach. Ouzts TX 18. Therefore, Claimant did return to full-time work as a cook for one and a half years before sustaining an aggravation of his injury on June 3, 1999. It is difficult to then successfully argue that Claimant's 1997 injury involving a box of frozen french fries "naturally" progressed to an inevitable injury to Claimant's fifth metatarsal and big toe. Instead, I hold that Claimant's 1999 complaints are to be characterized as a separate injury, thereby making Claimant eligible for benefits at his 1999 AWW.

Employer argues and I agree that the subsequent injuries were the natural progression of Claimant's underlying diabetic condition rather than from the 1997 injury

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[4]However, I note Claimant's contention that there seems to be little to no testimony regarding a tangible second accident. Claimant testified that he did not have a second accident in 1999. Nevertheless, the claims adjuster in this case, Ms. Ana Ouzts, testified that she understood there to be a second accident. Ouzts TX 35. Although Claimant argues that such testimony is vague and self-serving, I cannot go so far as to conclude that Claimant did not, in fact, again injure himself on or about June 3, 1999, thereby establishing a second accident.

alone. Dr. J. Bornstein determined that Claimant would be unable to return to work as a full-time cook, due to extended standing requirements because of his diabetic peripheral polyneuropathy, not by any prior injury. EX 16. Claimant's 1999 injury was again brought about as a result of the natural progression of the underlying diabetic disease processes. Dr. J. Bornstein testified that Claimant has a biomechanical, gait imbalance due to the resection of his second and third metatarsals, making him more prone to the skin on the bottoms of his feet breaking down and resulting in foot ulcers. EX 16. Nevertheless, he was able to return to work on a full-time basis until his second injury in 1999, after which he became disabled again. Claimant even testified at formal hearing that in between right foot injuries, he developed an open wound in the arch of his left foot, which caused an increase in weight bearing on his right foot, which lead to additional problems. TX 42. Claimant treated with Dr. J. Bornstein for the left foot injury which was covered by personal health insurance over the course of nineteen visits from August 20, 1998 to May 19, 1999. TX 73, 92; EX 16, 21. Therefore, I cannot logically conclude that the second injury was the natural progression of the first injury. The occurrence of a foot ulcer in different areas of the foot following the June 3, 1999 foot injury was the natural progression of Claimant's diabetic disease and not his initial traumatic foot injury.

As Employer argues, Dr. Hoffman's testimony corroborates this understanding. He began treating Claimant on May 5, 1995 for already diagnosed adult onset diabetes mellitus (AODM), and re-filled his prescription for high blood pressure medication and for Diabtea. EX 22. In 1996, Dr. Hoffman began prescribing Glaucophage for Claimant's diabetic condition specifically because of his very high blood sugar which was poorly controlled. EX 22. Like Dr. J. Bornstein, Dr. Hoffman diagnosed Claimant with diabetic peripheral polyneuropathy in his lower extremities. EX 22.

Finally, the two injuries are to completely separate parts of the foot. Dr. J. Bornstein diagnosed Claimant on June 7, 1999 with "an ulcer underneath the fifth metatarsal right and underneath the right hallux" or big toe. EX 16. As Employer, notes, this is not in any way the same injury as Claimant's 1997 injury. At that time, Claimant had, according to his orthopedic surgeon Dr. Raymond Pierson, M.D., "an acute diabetic forefoot infection, with cellulitis and plantar abscess in the region of his second toe, and chronic neuropathic ulcer, grade 3, [in the region] of the second and third metatarsphalangeal joint, together with a hammer toe deformity to the second and third toes." EX 2. Claimant's condition in November of 1997 included, "plantar abscess ... noted at the second toe ..., [radiographs] of the forefoot demonstrate fixed forefoot deformity is in the region of the second toe, related to the hammer toe deformities, and in addition there was evidence for destruction of the metatarsal heads of the second and third metatarsphalangeal joints." EX 2. Dr. J. Bornstein testified that Claimant has a biomechanical imbalance as a result of the November 5, 1997 resection of the second and third metatarsals by Dr. Pierson, which renders him predisposed to overuse lesions or tissue breakdown (EX 16, 21). I cannot hold that the June 3, 1999 injury to Claimant's big toe and fifth metatarsal was the "natural progression" of the October 22, 1997 injury to his second and third metatarsals. Such an arguments fails to take into account the long-standing and pre-existing diabetic condition, and the diabetic peripheral polyneuropathy of the patient.

Instead, I find that Claimant reached MMI from the first injury on or before May 21, 1998, and returned to work full-time in January of 1998 and worked consistently until June, 1999 when he sustained a separate injury to a different part of his right foot. As in *Strachan*, I hold that the June 3, 1999 injury allows for calculation of Claimant's AWW from that date.

Issue 2: Claimant's First Choice Physician and Status of Treatment with Dr. Mark Bornstein

An employer found liable for the payment of compensation is, pursuant to §7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc*., 8 BRBS 130 (1978). Furthermore, an employee's right to select his own physician, pursuant to §7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). According to 20 C.F.R. § 712.406(a), whenever the employee has made his initial, first choice of an attending physician, he may not, thereafter, change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change. *See id.*

In this matter, my earlier finding of two dates of injury allows for the selection of a free choice physician following each date of injury. Claimant argues that he was never given the opportunity to select his free choice physician following either injury. Rather, Claimant believes that Employer/Carrier designated Dr. Pierson as his free choice physician following his 1997 accident and Dr. J. Bornstein following his 1999 injury. Claimant further argues that there is not one document, statement or any other evidence indicating that Claimant made a first choice of physician. Instead, he argues that even Ms. Ouzts, the claims adjuster in this matter, testified to the existence of a December 10, 1999 letter from Claimant requesting one of three physicians and nursing assistance, as well as a request to seek treatment with Dr. Shea. Ouzts TX 35; 39. Further, Claimant argues that the only physician he ever freely chose was Dr. M. Bornstein and this request was denied by the Carrier. Ouzts TX 50-51.

Nevertheless, Claimant seemingly disregarded 20 C.F.R. §405 when he stated that he was never given his free choice physician. In pertinent part, Section 405 states:

> Whenever the nature of the injury is such that immediate medical attention is required and the injured employee is unable to select a physician, the employer shall select a physician. Thereafter, the employee may change physicians when he is able to make a selection. Such changes shall be made upon obtaining written authorization from the employer or, if consent is withheld, from the district director.

In Claimant's April 28, 2000 deposition (EX 15), he stated that he did not have a choice in the matter as to having Dr. Pierson conduct his November 5, 1997 surgery. The following exchange took place:

> Q. Okay. Did you have any problems, though, with Dr. Pierson operating on you at that point in time? I am not talking about in the aftermath, but ...
>
> A. I had no choice in the matter because it was an emergency case. They recommend – my blood count was so high, I had to go into be taken care of, so I had to take the physician on duty.
>
> Q. Okay. But again, my question to you is, were you sent by an employer – by your employer at the time, the Army non-Appropriated Fund, to either Dr. Pierson or Dr. J. Bornstein or did you just agree to them being your treating physicians?
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> A. At that particular time, yes.
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> Q. You did agree to them being your treating physicians at that point in time; is that correct?
>
> A. That is correct.

Even by Claimant's own admission, the situation was an emergency, thereby qualifying it under Section 702.405. Claimant has not provided any additional evidence that would indicate to me that Section 702.405 does not apply to his situation or that Dr. Pierson was not properly designated as his first choice physician in light of the emergency situation.[5] As the statute provides, if Claimant wanted to change this situation, he was free to request a change of physician at any point following the emergency surgery within the provisions of 20 C.F.R. 712.406(a). After a complete and thorough review of the evidence, I find that Claimant did not make such a request in reference to his October 22, 1997 injury. Therefore, the classification of Dr. Pierson as Claimant's first choice physician with regards to that injury is appropriate and correct.

The situation surrounding Claimant's first choice of physician with regards to his June 3, 1999 injury is far less clear. Employer argues that Claimant freely chose Dr. J. Bornstein as his physician following his June 3, 1999 injury. Employer points to the decision in *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780, 786 (D.C. Cir. 1984), where the court held that the applicable codes of federal regulation and statutes state that any

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[5]Although Claimant's counsel argued that Claimant never had a "choice" in this decision, as eloquently defined in his closing brief, the fact remains that 20 C.F.R. §405 allows for such an indirect choice.

change in physician requires the consent of the employer to such change only if the employee initially chose a physician who was not a specialist, or if the employee demonstrates good cause for a change in physician. Of course, this decision can only follow an applicable and appropriate first choice of physician. As previously held, the June 3, 1999 injury is to be considered a new injury. *See supra*. With this in mind, Claimant's previous indirect selection of Dr. Pierson is not applicable here. Therefore, the remaining questions are (1) whether or not Claimant chose Dr. J. Bornstein as his first choice physician for the 1999 claim; (2) whether or not Claimant properly changed his first choice physician to Dr. Mark Bornstein.

The evidence suggests that Claimant did, in fact, choose Dr. J. Bornstein for treatment regarding his 1999 injuries. It is undisputed that Claimant treated over the course of nineteen (19) office visits with Dr. J. Bornstein, from August 20, 1998 through May 19, 1999 for left foot problems paid for by Claimant's private health insurance. This occurred prior to Dr. J. Bornstein's treatment of Claimant's right foot complaints on and after June 3, 1999. According to Dr. J. Bornstein's office notes, Claimant called his office on June 3, 1999 at 4:45 p.m. requesting to be seen due to a new ulcer developing on the right foot. EX 16. Dr. J. Bornstein stated that he never previously treated Claimant for injuries to the right foot, only his left foot. EX 16. Ms. Ouzts, the claims adjuster in this matter, believes that Claimant selected Dr. J. Bornstein because he was already treating with him for unrelated conditions. Although, she further noted that she does not have any paperwork indicating a choice of physician. Ouzts TX 26-28. However, the plain meaning of the statute does not speak of a required form indicating choice of physician. As such, I must find that Claimant's actions indicate a decision to be treated by Dr. J. Bornstein following his injury in 1999. Not only did he request an appointment on June 3, 1999, but he also had been previously treating with Dr. Bornstein for an extended period of time. The evidence does not suggest that this previous treatment was coerced or forced upon Claimant. Therefore, I am left to believe that Claimant freely chose to be treated by Dr. J. Bornstein and I hold that he is Claimant's first choice physician for the 1999 claim.

Claimant argues that the Carrier should have called or otherwise corresponded with Claimant so as to inform him of his ability to freely choose a physician. I agree that every effort should be made to insure that Claimant is aware of this ability. However, it is apparent to me that Claimant was able to freely make this decision on his own, as evidenced by his initial phone call to Dr. J. Bornstein's office requesting an appointment.

The next issue regarding Claimant's free choice of physician on his 1999 injury involves whether or not he properly requested a change of treating physicians from Dr. J. Bornstein to Dr. Mark Bornstein. As stated, *supra*, the employer is required to consent to a change of physicians only in two situations: if the employee initially chose a physician who was not a specialist, or if the employee demonstrates good cause for a change of physician. As earlier stated, Claimant chose Dr. J. Bornstein, a podiatrist, to treat his 1999 injury. Dr. J. Bornstein has never refused to treat Claimant. Further, Dr. J. Bornstein stated that Claimant continued to treat with him for at least five more visits. J. Bornstein 1/24/02, TX 6. He further testified that his brother, Dr. Mark Bornstein, a fellow podiatrist,

has similar credentials and no more of a specialty in treating patients with diabetic neuropathy than he does. J. Bornstein 1/24/02, TX 35. Weighing the two doctors' similar backgrounds, practice areas, and specialties, I cannot consider Dr. Mark Bornstein any more of a specialist in the field of podiatry than his brother, Dr. J. Bronstein. As such, I cannot grant Claimant's request for a change in first choice physician on this ground.

Therefore, Claimant is left to prove that there is good cause as to why he should change his treating physician to Dr. Mark Bornstein, as he is currently requesting. The regulations only state that an employer may authorize a change for good cause; it is not required to authorize a change fo this reason. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). On November 22, 1999, Claimant's counsel informed Ms. Ouzts via letter that Claimant requested a change in treating physician from Dr. J. Bornstein to Dr. Mark Bornstein. CX 3. Claimant's counsel once again requested this change in a December 10, 1999 letter to Ms. Ouzts. CX 4. However, the reasons given for this requested change range from a simple preference for Dr. Mark Bornstein to an unfounded statement that Claimant has determined, after consultation, that Dr. Mark Bornstein would be in a better position to be able to properly evaluate and treat him. CX 3. These reasons do not demonstrate good cause. Further, Employer authorized a one time evaluation by Dr. Mark Bornstein. EX 10. Dr. Mark Bornstein rendered his opinion on this matter and it has been duly noted by this court.[6] Claimant's initial choice was to be treated by Dr. J. Bornstein. Such treatment was provided by Employer. I must agree with the court in Todd shipyards, Inc. v. Fraley, 592 F.2d 805, 813 (5th Cir. 1979), when it stated that the Employer is not required to send a worker who claims to be injured to every qualified doctor who can be found to address [his] medical problems. While I understand the plain terms of the statute are to be interpreted liberally, this does not mean that "the plain terms of the statute may be disregarded under the guise of interpreting it liberally." Nardella v. Cambell Machine, Inc., 525 F.2d 46, 51 (9th Cir. 1975). Since Claimant has not shown good cause for a change, I hold that his first choice physician should not be changed to Dr. Mark Bornstein.

Issue 3: Nature and Compensability of Claimant's Left Foot Injury

It is undisputed that Claimant suffered an injury on October 23, 1997 when a box of frozen french fries fell on to his right foot. As noted above, I have held that Claimant endured a separate injury to this foot on June 3, 1999, thereby entitling him to benefits based on his AWW on that date. Claimant now argues that the injuries to Claimant's left foot, treated by Dr. J. Bornstein, independent of Claimant's 1997 claim, are also compensable. In essence, Claimant requests that this court, using the evidence and the Section 20(a) presumption, should find that his original right foot injury in 1997 caused the left foot injury in addition to the reoccurrence to the right foot. I find that compensation for

[6]Claimant's stated problems with Dr. J. Bornstein were: (1) that he was sending Claimant back to work when Claimant felt that his was incapable of doing so; (2) feelings of uncertainty regarding Dr. J. Bornstein's opinions and diagnoses. EX 15.

Claimant's left foot injuries are disallowed because of his failure to properly notify Employer of this injury within the provisions of 33 U.S.C. §12(a).

In pertinent part, 33 U.S.C. § 920 of the Act provides that in any proceeding for the enforcement of a claim for compensation under the Act, it shall be presumed, in the absence of evidence to the contrary, that sufficient notice of such claim has been given. Further, Section 12(a) of the Act, in pertinent part, states that notice of an injury or death for which compensation is payable must be given within thirty (30) days after the injury or within thirty (30) days after employee is aware of, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware of, a relationship between the injury and the employment. It is Claimant's burden to establish timely notice. Failure to give notice under Section 12(a) will bar the claim unless Section 12(d) applies. Section 12(d) provides the Claimant with defenses to this bar. These defenses require the claimant to show that either the employer had knowledge during the filing period, or that the employer was not prejudiced by the failure to file timely notice, or that the failure to file timely notice was excused.

In this matter, Claimant argues that he did raise the issue pertaining to the left foot's compensability as a consequence of the original right foot injury by way of the LS-18 and Pre-Trial submissions. After an extensive review of the evidence, including the three LS-18 forms filed by the claimant to date, I cannot see how the Claimant put the Employer or the District Director on notice as to the compensability of his left foot injuries being contested in this matter. Three LS-18 forms have been submitted into evidence on three separate dates: October 4, 1999, August 2, 2001, and September 11, 2001. When asked to briefly state the facts of this claim on all three forms, Claimant indicated that the injury resulted from standing and working in the kitchen. CX 1, CX 6, CX 7. When asked to state the issues Claimant will present for resolution at a formal hearing, Claimant did not specifically state injuries related to his left foot, but spoke in general terms regarding the injury as a whole. Upon review of the pre-trial submissions, both parties sent the undersigned proposed Pre-Trial Stipulations. On October 3, 2001, Claimant stated, through his proposed stipulations, that the dates of injury were June 3, 1999 and October 26, 1997 and the injuries resulted from standing and working in the kitchen and Claimant dropped a large box of potatoes on his foot. When asked if and when the Employer has been timely notified of the injury, Claimant responded in the affirmative on both June 3, 1999 and October 26, 1997.

Finally, under unresolved issues, Claimant did not once mention the left foot injury. Although Employer stated in his stipulations that notice had been timely given, I find that such notice was for claims resulting in injuries to Claimant's right foot. Even Employer's LS-18, submitted on September 27, 2001, describes the claim only in terms of Claimant's right foot and back. At no point throughout Employer's correspondence submitted to the undersigned, Employer's closing brief in this matter, or Employer's submitted evidence does he defend a claim regarding Claimant's left foot. In fact, throughout Employer's closing brief, he describes Claimant's previous treatment with Dr. J. Bornstein for his left foot injury as "unrelated" and covered by personal insurance. The first and only point at

which the issue of compensability regarding Claimant's left foot is made wholly clear is in Claimant's closing brief, which was submitted after Employer's closing brief. The general terms used to describe the issues in this matter on both the proposed stipulations and the LS-18 forms can easily be read to pertain only to Claimant's right foot. Due to the ambivalence and overall lack of clarity regarding this issue, I simply cannot hold Employer liable for an injury for which it was never put on notice to defend and, ultimately, did not defend.

I am aware of the relevant caselaw stating that where one injury arises out of an accident that has been reported, the claimant does not have to give separate notice of other injuries resulting from the same accident. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). However, there is much dispute as to whether Claimant's left foot injury was a result of his initial injury or should be classified as a separate injury altogether. Claimant received treatment from Dr. J. Bornstein for his left foot injury from August 28, 1998 until May 19, 1999. Dr. J. Bornstein has maintained his position that he cannot give an opinion as to whether Claimant's left foot diabetic neuropathy was aggravated or not by the October, 1997 incident. J. Bornstein, 8/16/2000, TX 39-40. Further, Dr. Shea testified that the right foot contributed to the left foot problems but he is not prepared to say that the right foot issue was the only contributing cause. He admitted that there could be other medical issues that Dr. J. Bornstein might be in a better position to address. TX 23. Only Dr. Mark Bornstein, after just one visit with Claimant, stated that the original foot injury in 1997 predisposed Claimant to developing the left foot problem. TX 7. By arguing that Claimant's left foot injury was causally related to his initial right foot injury, Claimant uses the Section 20(a) presumption to allocate liability to Employer. However, in light of both Dr. J. Bornstein and Dr. Shea's testimony, the left foot injury was, at the very least, not a direct result of the right foot injury. Thus, unlike in *Thompson*, *supra*, a separate notice requirement exists. Section 20(a) presumption aside, according to Section 20(b), proper notice has not been given in this decision in order to resolve this issue. As such, Claimant is left to argue that his left foot injury is wholly separate from the right foot injury and submit a claim as to such.

Issue 4: Prior treatment with Dr. James K. Shea

Claimant treated with Dr. James K. Shea for one visit, on December 21, 2000, complaining of lower back pain and right foot pain. CX 8. As indicated by his testimony, Dr. Shea ultimately diagnosed Claimant with chronic lower back pain and deferred his opinion on Claimant's diabetic neuropathy to his treating physician. Dr. Shea stated that he believes there exists a causal relationship between the low back pain and the original injury to Claimant's right foot in 1997. TX 18. He further stated that this result is based on Claimant's altered gait caused by the removal of his metatarsal tips. TX 18-19. Dr. Shea recommended a strengthening program to treat Claimant's alleged low back pain.

The issue here is not whether Claimant is entitled to further treatment with Dr. Shea, but whether he should be reimbursed for his December 21, 2000 treatment with him. I find that Claimant should not be reimbursed by Employer for such treatment. As evidenced by

his May 30, 2000 letter to Ms. Ouzts, the adjuster in this matter, Claimant notified Employer of a need for back pain treatment and a desire for treatment with Dr. Shea. CX 5. However, Ms. Ouzts testified that she was aware of this request and that this request was denied based on a lack of necessity expressed from Claimant's treating physician.[7] She stated that she was not aware of any information stating that Claimant suffered from lower back pain. TX 40. As such, no authorization was granted for Dr. Shea to treat Claimant for lower back pain. TX 42, 48. In his August 16, 2000 deposition, Dr. J. Bornstein testified that he did not recall Claimant mentioning back pain. TX 16. However, in his later deposition, Dr. J. Bornstein indirectly indicated that he recognizes the propensity of an individual to develop low back pain from foot injuries and indicated that Claimant mentioned low back pain during treatment on October 17, 2001. TX 41.

In summary, Claimant treated with Dr. Mark Bornstein on May 26, 2000 and noted back pain, again noted back pain to Dr. Shea in December, 2000, but then never mentioned back pain to his treating physician, Dr. J. Bornstein until ten months later on October 17, 2001. Employer, basing its decision on the opinion of the treating physician in this matter, denied treatment with Dr. Shea prior to October 17, 2001, noting that it was unnecessary. Based on Claimant's failure to consistently indicate his back pain, I must find in favor of Employer's decision to withhold payment for treatment with Dr. Shea. Employer never received notification of any back pain from Claimant's treating physician, and therefore deduced that such treatment was unnecessary. In light of the evidence, I cannot fault the Employer for such an understanding.

Issue 5: Entitlement to Pain Management due to right foot pain

At the October 24, 2001 hearing on this matter, the issue of Claimant's pain management was before the court. On September 17, 2001, Dr. J. Bornstein referred Claimant for pain management. The issue here is whether the pain management referral was for Claimant's right foot, low back, or both. I find that Dr. J. Bornstein's referral includes treatment for both. Such a conclusion is supported by his earlier statements citing the reason for his pain management referral on September 17, 2001, in addition to his later understanding of Claimant's back pain complaints. The following exchange at Dr. J. Bornstein's January 24, 2002 (TX 44-46) deposition supports this contention:

> Q. Your referral for pain management, as you explained it in deposition today, be primarily for Mr. Turner's neuropathic foot pain or primarily for his low back pain or both?
>
> A. I'm going to tell you probably, you know, both. I think independent of each other, I think either one would generate a referral from me. The one reference you see to the lower back, if this was another patient who had just came in one time and complained of lower back pain,

[7]Claimant's treating physician at this time was Dr. J. Bornstein.

would I send him specifically for that? No. Certainly we try to work it up a little bit more and find out of there was some other cause. But, I think, you know, if the patient comes in and we feel they've got potentially a disc issue or a nerve root impingement, yeah, we may very well send him there for that in and of itself.

Typically, with that particular issue, I probably would do a nerve conduction study by a neurologist and let him rule. And if he comes back and tells me there's an issue with the nerve root or disc, then now he goes to pain management. But I think, at that point, if Larry hadn't complained of lower back pain, I probably still would have sent him. But, the fact that he did, in my mind, that's just one more thing that they can look at.

Q. On September 5, 2001, did Larry complain of any kind of low back pain?

A. Not in this note, in this Dr. Sarantino's note, but there's no reference to it here.

Q. Let me ask you to assume that the prescription by your office, be it by your partner or yourself was in September of 2001. Do you have any idea whether that pain referral was because of the chronic foot pain or because of the low back or a combination of both?

A. Absent anything in the chart regarding lower back pain prior to then, I would have to assume it would have been simply on the basis of the neuropathic pain.

Q. In the foot?

A. In the foot.

Therefore, it is undisputed that Dr. J. Bornstein referred Claimant to a pain management specialist for his foot pain. However, as of the date of his second deposition and in light of Claimant's back pain complaints on October 17, 2001, Dr. J. Bornstein would also send him out for back pain management. I find that the Claimant is entitled to such treatment. As stated, *supra*, Claimant's back injuries have been causally linked to his compensable foot injuries. Both Dr. Mark Bornstein and Dr. Shea noted complaints of low back pain and further stated that the pain is causally related to his foot injuries. And finally, Dr. J. Bornstein even stated, however indirectly, that such pain is a common effect of foot injuries. He further stated that, in light of Claimant's indications on October 17, 2001, he would have a pain management specialist examine Claimant's back. Therefore, I find that further treatment for back pain management, as well as foot pain management is appropriate here.

As the statute provides, in cases where the employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease, the authorization shall be given. *See* 20 C.F.R. §702.406(a) and 20 C.F.R. §702.419. With regards to a pain management specialist, I agree with Claimant's statements that Dr. J. Bornstein really did not have a strong opinion on the issue, that he had referred other people to Florida Hospital but did not know of their qualifications or results, and that it would be acceptable to utilize a physiatrist for the purposes of pain management. J. Bornstein, January 24, 2002, TX 10. Although he stated that he had previously sent his patients for pain management to Florida Hospital, he did not specifically recommend such treatment for Claimant.

Nevertheless, on February 8, 2002, Employer responded to Dr. J. Bornstein's September 17, 2001 referral for pain management by way of a letter to Claimant. Therefore, nearly five months after the initial referral, Employer designated Dr. Joseph Rubeis of the Florida Hospital Center to treat Claimant for foot pain management. In light of the applicable statutes in this matter, I hold that Claimant is entitled to see his choice of pain management specialist in order to treat his foot pain. *See* 20 C.F.R. §702.406(a) and 20 C.F.R. §702.419. Based on the evidence presented, Claimant has indicated a desire to be treated for pain management by Dr. James K. Shea. Dr. Shea is a physiatrist and, based on Dr. J. Bornstein's testimony, would be appropriate for treatment in this area. However, Dr. Shea has stated that he does not believe that Claimant has any sensory abnormality in his feet. Shea TX 31. Instead, he stated that his diagnosis was that Claimant had back problems relating to improper body mechanics during walking which lead to some degeneration in his lower back and resulted in chronic lower back pain. Shea TX 10-11. Based on my aforementioned ruling regarding Claimant's low back pain, I must note here that Claimant's December 21, 2000 treatment with Dr. Shea remains non-compensable. Further, based on Dr. Shea's diagnosis of a lack of sensory abnormality in Claimant's feet, it is questionable as to whether he will be of any help to Claimant in this area. Nevertheless, that decision rests with Claimant and he is entitled to future benefits for back and right foot pain management.

Issue 6: Nature and Extent of Disability[8]

Before discussing each injury, I note that total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, taking into consideration Claimant's age, education, work

[8]As noted, *supra*, Employer has stipulated to the 1997 and 1999 accidents being compensable. As such, Employer has paid medical and disability benefits under the Act following both injuries.

experience, and physical restrictions, and which he could secure if he diligently tried. *Mills v. Marine Repair Service*, 21 BRBS 115, 117 (1988); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976), *aff'g.* 2 BRBS 178 (1975); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, n.7 and related text (3d Cir. 1979). If Employer satisfies its burden, then Claimant, at most, may be partially disabled. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, Claimant can rebut Employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. (1986).

As for the nature of Claimant's disability, it is permanent rather than temporary if it has continued for a lengthy period and appears to be of a lasting or indefinite duration, rather than one in which recovery awaits a normal healing period. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert denied*, 394 U.S. 976 (1969). Thus a claimant is considered permanently disabled if, upon reaching maximum medical improvement (MMI), he has a residual disability. *Louisiana Insurance, supra* at 126.

A. Claimant's October 22, 1997 Traumatic Injury

This matter is a "scheduled injury" case. That is, Claimant's initial traumatic injury is a case involving a permanently-partially disabled employee whose injury was the kind specifically identified in the Section 8(c)(1)-(20) schedule set forth in the Act. 33 U.S.C. § 908(c)(1) - (20); *See Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 273 (1980). More specifically, this matter falls within Section 8(c)(4), pertaining to foot impairments. Claimant reached maximum medical improvement (MMI) on May 21, 1998. *See supra*. From the date of injury until Claimant's return to work full-time with the Employer with restrictions on January 22, 1998, he was paid at an Average Weekly Wage of 579.87, compensation rate of 386.77. This wage was calculated based on his part-time work at the Orlando Ale House, as mentioned, *supra*. However, after his return to work, his disability payments were reduced to 119.79, which covered his part-time job losses. Ultimately, these payments ended on June 11, 1998 in light of Dr. Urbach's determination that Claimant had reached MMI. Subsequently, Claimant continued to work for substantially the whole of the year from June 4, 1998 until June 3, 1999 for the Employer.

I find that this injury only affected Claimant's leg and, as such, should be paid in accordance with the given rate of impairment and average weekly wage. On December 2, 1998, Employer made a scheduled thirteen percent (13%) permanent partial disability payment to Claimant of $10,307.42, reflecting 26.65 weeks of benefits at an average weekly wage of $386.77. *See supra* regarding average weekly wage determination. This payment was based on the independent medical examiner's (Dr. Urbach, podiatrist)

opinion that the Claimant had reached maximum medical improvement on May 21, 1998. Thereafter, an additional two percent (2%) permanent partial disability payment of $1,585.15 was made by the Employer to the Claimant on September 19, 2000 following the deposition of authorized treating podiatrist Dr. J. Bornstein, wherein Dr. Bornstein rated Claimant with a fifteen percent (15%) permanent partial disability to his right lower extremity. In effect, the Employer has made all disability payments required by the Act for Claimant's 1997 injury.

B. Claimant's June 3, 1999 Injury

After reviewing all the testimony in this matter, I conclude that Claimant has reached a point of maximum medical improvement (MMI) regarding his 1999 injury. Dr. J. Bornstein declared Claimant as once again reaching a point of MMI for his right foot on July 17, 2000. EX 16. Ms. Ouzts stated that her records indicate this date as being received from Dr. J. Bornstein as the Claimant's date of MMI on his second accident. Ouzts, TX 31. I credit Dr. J. Bornstein's findings as well as Ms. Ouzts' statement that she had received his findings regarding MMI on the aforementioned date. Ouzts TX 31. In light of this testimony, I hold July 17, 2000 as the MMI date for Claimant's 1999 injury.

Unlike the initial traumatic injury, this later injury is not a scheduled payment situation in accordance with Section 8(c)(1)-(20). Although I find that Claimant has been given a creditable date of MMI, I do not find that any physician has specifically addressed Claimant's rate of impairment following the second date of injury. *See infra* regarding date of MMI. Without the requisite rate of impairment, it is not possible to make an award based on the Act's enumerated schedule. In light of this understanding, I find that this injury should be considered under the guidelines of Section 8(c)(21). In accordance with this section, I hold that Claimant is entitled to compensation equal to two-thirds of the difference between his pre-injury AWW and his post injury wage earning capacity.

Therefore, the issue then becomes whether Claimant has been given an impairment rating by any of his examining physicians for this injury. As stated, *supra*, I hold that he has not been given such a rating. Ms. Ouzts testified that, unlike in the initial injury, an impairment rating had not been accepted by the Carrier and none had been assigned regarding Claimant's second injury. Dr. J. Bornstein testified on August 16, 2000 that, when using the AMA Guidelines with respect to Claimant's 1999 injury, attempts at quantifying permanency cannot be accurate. EX 16 at 27-28. Although he eventually correlated fifteen percent (15%) of the lower extremity as impaired, his previous statements tend to discredit its accuracy. EX 16 at 29. At the same time, Dr. J. Bornstein was never asked for an impairment rating based solely on the later injury. Taking his testimony at face value, one cannot distinguish whether he is simply re-stating the impairment rating from the earlier injury, assigning another rating based solely on this injury, or even stating that the fifteen percent impairment rating remains unchanged between injuries. Therefore, I cannot credit Dr. J. Bornstein's conclusion regarding an impairment rating and hold that an impairment rating has not been designated for Claimant's June 3, 1999 injury.

In light of this finding, Claimant is entitled to compensation equal to two-thirds of the difference between the Claimant's pre-injury AWW and his post injury wage earning capacity. *See PEPCO, supra*. As already established in this opinion, in any situation wherein Claimant works at his regular employment for substantially the whole of the year prior to the date of injury, or alternatively returns to work form a prior injury and then works at his regular employment for substantially the whole of the year prior to re-injury such that 33 USC §910(a) is applicable, an ALJ under these circumstances has little discretion but to apply the Section 910(a) formula calling for AWW calculation based upon the 52 weeks immediately prior to the injury, or alternatively the most recent injury. *See Director, OWCP, v. General Dynamics, Corp.*, 769 F.2d 66 (2nd Cir. 1985). For the fifty-two week period between June 4, 1998 and June 3, 1999, Employer's payroll records demonstrate Claimant's AWW to be $341.09 with a compensation rate of $227.40.

At the same time, Employer's Labor Market Survey reveals that Claimant has been medically approved to perform, and is therefore capable of performing, a variety of jobs within his geographic locale. EX 7. Courts have held that employers can demonstrate the availability of suitable employment through the expert opinion of a vocational rehabilitation counselor or consultant. *Hunter v. Duncanson-Harrelson Co.*, 14 BRBS 424 (1982). That vocational counselor need only perform a labor market survey to determine what type of "suitable work is available for which the Claimant could compete realistically. *Tann v. Newport News Shipbuilding & Dry Dick Co.*, 84 F.2d 540, 543 (4th Cir. 1984). As recently as July 12, 2001, Employer's Labor Market Survey revealed positions which paid $6.50-8.00/hour. These positions were light, sedentary duty positions, approved by Claimant's treating physician, Dr. J. Bornstein. Using this survey and based on a forty-hour work week at $6.50/hour, Claimant's current wage earning capacity is $260.00/week. I therefore hold that Claimant is entitled to two-thirds of the difference between Claimant's pre-injury AWW ($341.07) and his post injury wage earning capacity ($260.00), amounting to $54.05/week.[9]

Issue 7: Rehabilitation/Vocational Training Benefits

There has been mention of Claimant's entitlement to vocational retraining benefits on pretrial stipulations forms. According to 20 C.F.R. §§702.501-508, an injured employee may receive an amount not to exceed $25/week in order to return permanently disabled person to gainful employment. This amount shall be commensurate with their impairments. My review of the Labor Market Survey completed in this matter reveals that Claimant has the current skills, abilities and physical capabilities to earn gainful employment. Therefore, I hold that Claimant is not entitled to Vocational Rehabilitation benefits. As such, I will not refer this case for further proceedings as to such benefits.

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[9]Claimant's low back pain complaints are irrelevant under *Barker* and will not be compensated as a scheduled injury. As such, Employer has paid medical and disability benefits under the Act following both injuries.

Issue 8: Attorney's Fees

Employer argues that, under 33 U.S.C. § 928(b), Claimant's counsel is not entitled to attorney's fees since none of the issues being litigated in this matter were the subject of an informal conference before a Claims Examiner at the Department of Labor-OWCP. However, the Benefits Review Board has generally followed the approach of the Ninth Circuit, specifically holding that an informal conference is not a prerequisite to employer's liability for claimant's attorney's fee, as the convening of an informal conference is an act within the discretion of the district director. *See Caine v. Washington Metropolitan Area Transit Authority*, 19 BRBS 180 (1986), citing *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986); *see* 20 C.F.R. §§ 702.301 - 702.316. In this Decision and Order Awarding Benefits, I held that Claimant is entitled to permanent partial disability benefits pursuant to Section 8(c) of the Act, as well as continuing medical treatment. Thus, as Claimant resorted to formal proceedings to successfully establish his entitlement to additional benefits under the Act, I hold that Claimant's counsel is entitled to an attorney's fee to be paid by Employer pursuant to Section 28(b). *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998).

No award of an attorney's fee for services to Claimant is made herein because no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby granted to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. §725.365 and §725.320 of the regulations. A service sheet showing service has been made to all the parties, including the Claimant, must accompany the application. Parties have ten (10) days following receipt of such application to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

It is hereby Ordered that:

1. The October 27, 1997 accident and June 3, 1999 accident are wholly separate incidents and any Average Weekly Wage calculation shall be in accordance with this decision.

2. Claimant's free choice of physician regarding his October 27, 1997 injury to his right foot is Dr. Pierson; Claimant's free choice of physician regarding his June 3, 1999 injury is Dr. J. Bornstein.

3. Employer remains liable for all reasonable medical costs necessitated by the injuries to Claimant's right foot. As such, Employer is liable for the occurrence and treatment of Claimant's pain management, in accordance with the referral by his treating physician, Dr. J. Bornstein. Further, Claimant's low back pain shall be considered a result of Claimant's right

foot injuries and Claimant is entitled to future pain management treatment in accordance with this opinion.

4. In accordance with the Act, Claimant is entitled to his free choice of specialist with regards to pain management.

5. Employer is not liable for Claimant's previous treatment with Dr. Shea.

6. This matter shall not be referred to the District Director for an award of Vocational Rehabilitation.

7. Claimant is entitled to two-thirds of the difference between the Claimant's pre-injury AWW ($341.07) and his post injury wage earning capacity ($260.00), amounting to $54.05/week.

8. Employer is entitled to a credit for all sums paid in accordance with the Act.

9. Employer shall pay Claimant's attorney fees and expenses to be established in a supplemental decision and order.

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PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Washington, DC 20013-7601. A copy of this Notice of Appeal must also be served upon Donald S. Shire, Associate Solicitor for Black Lung Benefits, Francis Perkins Bldg., Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.